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IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

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CATHY S. GATSON, CLERK
KANAWHA CO. CIRCUIT COURT

STATE OF WEST VIRGINIA EX REL. MICHAEL CLIFFORD, IN HIS OFFICIAL CAPACITY AS THE DULY ELECTED, QUALIFIED, AND ACTING PROSECUTING ATTORNEY OF KANAWHA COUNTY, WEST VIRGINIA,

Petitioner,[1]

v.

Civil Action No. 04-AA-26
Jennifer Bailey Walker, Judge

BAYER CORPORATION,

Respondent.

FINAL ORDER GRANTING WRIT OF CERTIORARI AND DENYING RESPONDENT RELIEF

I. INTRODUCTION

West Virginia Code § 11-3-27, entitled "Relief in County Commission from Erroneous Assessment," is a tax exoneration statute authorizing county commissions to correct errors in county property books "resulting from a clerical error or a mistake occasioned by an unintentional or inadvertent act as distinguished from a mistake growing out of negligence or the exercise of poor judgment." Pending before the Court is a petition for a writ of certiorari filed by the Prosecuting Attorney of Kanawha County (and joined in by the Assessor and Library Commission of Kanawha County) asking this Court to reverse a 2-1 decision of the Kanawha County Commission granting

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[1]The Court has granted intervention status to Phyllis Gatson who is the duly elected and sworn Assessor of Kanawha County. The Court has also granted intervention status to the Kanawha County Library Commission.

Bayer an exoneration under West Virginia Code § 11-3-27. Accordingly, the Court does hereby find that Bayer is not entitled to relief.

The Court notes that is has received the Respondent's Memorandum of Law on Due Process and the Burden of Proof, filed on May 17, 2006, and the Assessor's Response to Respondent's Memorandum of Law on Due Process and the Burden of Proof, filed on June 30, 2006. The Court has considered both memoranda in formulating this opinion.

II. THE WRIT OF CERTIORARI

Before proceeding to a discussion of the facts and substantive legal issues in this case, the Court finds it necessary to set forth the somewhat unique standards governing certiorari because such standard directly impacts not only the Court's legal conclusions, but its fact finding role as well.[2]

West Virginia Code § 53-3-2 provides:

> In every case, matter or proceeding, in which a certiorari might be issued as the law heretofore has been, and in every case, matter or proceeding before a county court, council of a city, town or village, justice or other inferior tribunal, the record or proceeding may, after a judgment or final order therein, or after any judgment or order therein abridging the freedom of a person, be removed by a writ of certiorari

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[2]While the parties agree that this Court should apply a de novo standard to legal issues and a clearly erroneous standard to factual questions, "[u]nfortunately, . . . the parties overlook W. Va. Code, [53-3-2] which directly prescribes the proper procedure." *West Virginia Dept. of Health and Human Resources v. Hess*, 189 W. Va. 357, 361, 432 S.E.2d 27, 31 (1993). ""When an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law."" *State v. Blake*, 197 W. Va. 700, 706 n.10, 478 S.E.2d 550, 556 n.10 (1996) (quoting *United States National Bank of Oregon v. Independent Ins. Agents of America, Inc.*, 508 U.S. 439, 446 (1993), quoting *Kamen v. Kemper Fin. Serv., Inc.*, 500 U.S. 90, 99 (1991)). The issue of certiorari is properly before the Court, as are the claims of the parties. Because this Court does not wish to "occasion appellate affirmation of incorrect legal results," *Elder v. Holloway*, 510 U.S. 510, 515 (1994), it chooses to apply the correct standards. *See Goldstein v. Madison Nat. Bank*, 807 F.2d 1070, 1072 n.5 (D.C. Cir. 1986) ("[A]pplication of the correct law is surely in the interest of justice, and well within the . . . appellate court's discretion to raise and decide on its own initiative.").

> to the circuit court of the county in which such judgment was rendered, or order made; except in cases where authority is or may be given by law to the circuit court, or the judge thereof in vacation, to review such judgment or order on motion, or on appeal, writ of error or supersedeas, or in some manner other than upon certiorari; but no certiorari shall be issued in civil cases before justices where the amount in controversy, exclusive of interest and costs, does not exceed fifteen dollars.

"*Certiorari* is an extraordinary remedy resorted to for the purpose of supplying a defect of justice in cases obviously entitled to redress and yet unprovided for by the ordinary forms of proceeding." Syl. Pt. 1, *Poe v. Marion Mach. Works*, 24 W. Va. 517 (1884). That is, "[w]herever by a dearth in a statute there is given no statutory right of review, the writ of certiorari is available in order to obtain judicial review of the findings of an administrative board." *City of Huntington v. State Water Comm'n,* 135 W. Va. 568, 576, 64 S.E.2d 225, 230 (1951). "Certiorari lies only to review judicial or quasi-judicial action of an inferior board or tribunal." Syl. Pt. 1, *Garrison v. City of Fairmont*, 150 W. Va. 498, 147 S.E.2d 397 (1966), *modified on other grounds by Lower Donnally Ass'n v. Charleston Mun. Planning Comm'n,* 212 W. Va. 623, 575 S.E.2d 233 (2002). A quasi-judicial proceeding is one where "judicial power exercised by an official not within the judicial branch of government." *Appalachian Power Co. v. PSC,* 162 W. Va. 839, 850, 253 S.E.2d 377, 385 (1979). "In passing upon an application for exoneration from taxes charged against the applicant, . . . a county court acts judicially[,]" Syl. Pt. 3 in part, *Humphreys v. County Court*, 90 W. Va. 315, 110 S.E. 701 (1922), so that "[n]o express remedy having been provided for review of its action in such case, the circuit court has jurisdiction to review the same by the writ of certiorari." *Id.* Syl. Pt. 4.

Under West Virginia Code § 53-3-3, "[the] circuit court shall, in addition to determining such questions as might have been determined upon a certiorari as the law heretofore was, review such

judgment, order or proceeding, of the county court . . . determine all questions arising on the law and evidence, and render such judgment or make such order upon the whole matter as law and justice may require." Thus, "[t]he writ of certiorari, when awarded in civil cases . . . is an appellate process, designed to effect the ends of justice[.]" Syl. Pt. 1, in part, *Michaelson v. Cautley*, 45 W. Va. 533, 32 S.E. 170 (1898).

While the Supreme Court of Appeals applies only a limited standard of review to a circuit court's decision in issuing a certiorari, *see* Syl., in part, *Snodgrass v. Board of Ed.*, 114 W. Va. 305, 171 742 (1933) ("When, after judgment on certiorari in the circuit court, a writ of error is prosecuted in this court to that judgment, a decision of the circuit court on the evidence will not be set aside unless it clearly appears to have been wrong."); Syl. Pt. 1, in part, *Michaelson v. Cautley*, 45 W. Va. 533, 32 S.E. 170 (1898) (holding that "the circuit court has a large discretion in awarding" certiorari, and "reviewing judgments, and . . . unless such discretion is plainly abused, [the Supreme Court of Appeals] cannot interfere therewith."), this Court's review of the Commission's decision is *de novo*, *Board of Ed. v. MacQueen,* 174 W. Va. 338, 340, 325 S.E.2d 355, 357 (1984), because "[o]n certiorari the circuit court is required to make an independent review of both law and fact in order to render judgment as law and justice may require." Syl. Pt. 1, *Harrison v. Ginsberg,* 169 W. Va. 162, 286 S.E.2d 276 (1982). *See also* 14 Am. Jur.2d *Certiorari* § 110 n. 84 (2000) (citing *State by Davis v. Hix*, 141 W.Va. 385, 90 S.E.2d 357 (1955)) ("In West Virginia, circuit courts, on certiorari, review matters of law and fact and make such disposition of a case as law and justice may require.").[3] In other words, '[t]he circuit court shall enter such judgment as the inferior court should

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[3]In *Adkins v. West Virginia Department of Education*, 210 W. Va. 105, 107-08, 556 S.E.2d 72, 74-75 (2001) (per curiam), the Supreme Court said, "[i]n *Beverlin v. Board of Educ. of Lewis*

(continued...)

have entered, not only in consideration of questions of law but of fact as well." *Harrison,* 169 W. Va. at 174, 286 S.E.2d at 283. *See generally* Syl., *Snodgrass v. Board of Ed.*, 114 W. Va. 305, 171 S.E. 742 (1933) ("Under the provisions of Code, 53-3-3, circuit courts, upon certiorari to inferior

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[3](...continued)
County, 158 W. Va. 1067, 216 S.E.2d 554 (1975), this Court "'established that on a writ of certiorari the court may review the action of the lower tribunal to determine if it acted in an arbitrary and capricious manner, and if it did, its action will be reversed.' *North v. West Virginia Bd. of Regents,* 160 W. Va. 248, 260, 233 S.E.2d 411, 418-19 (1977)." (footnote omitted). This Court does not find *Adkins* controlling.

First, *Harrison* itself noted that

> [t]here is language in some relatively recent opinions of this Court indicating that if an inferior tribunal's decision is arbitrary and capricious it should not be affirmed by the circuit court on certiorari. *See North v. West Virginia Board of Regents, supra; Beverlin v. Board of Education of Lewis County*, W. Va., 216 S.E.2d 554 (1975). While we agree that an arbitrary and capricious decision of an inferior tribunal should not be affirmed by the circuit court on certiorari, in light of the language of W. Va. § 53-3-3 these cases cannot be read as limiting the circuit court on certiorari to an arbitrary and capricious standard of review. Such a result would be inconsistent with our holding in *North* that in proper circumstances, the circuit court on certiorari is authorized to take evidence independent of that contained in the record of the lower tribunal.

169 W. Va. at 175, 286 S.E.2d at 283.

Second, *Adkins* was a per curiam opinion, and the Supreme Court of Appeals held in syllabus point 2 of *Walker v. Doe*, 210 W. Va. 490, 558 S.E.2d 290 (2001) that it "will use signed opinions when new points of law are announced and those points will be articulated through syllabus points as required by our state constitution." *See also Phares v. Brooks*, 214 W. Va. 442, 447 n.5, 590 S.E.2d 370, 375 n.5 (2003) (per curiam) ("'[A] *per curiam* opinion that appears to deviate from generally accepted rules of law is not binding on the circuit courts, and should be relied upon only with great caution.' *Graf v. West Virginia Univ.,* 189 W. Va. 214, 429 S.E.2d 496 (1992).").

Finally, in *Adkins v. Gatson*, No. 32509, slip op. at 8 (W. Va. Nov. 17, 2005) (per curiam), the Supreme Court of Appeals' most recent pronouncement, the Court reiterated syllabus point 3 of *Harrison v. Ginsberg* stating that it "'has recognized that '[o]n certiorari the circuit court is required to make an independent review of both law and fact in order to render judgment as law and justice may require.'"

tribunals, are authorized to review matters of both law and fact and to dispose of the case 'as law and justice may require.' When, after judgment on certiorari in the circuit court, a writ of error is prosecuted in this court to that judgment, a decision of the circuit court on the evidence will not be set aside unless it clearly appears to have been wrong."). Thus, in certiorari, this Court's role is, among other things, as a "'fact finding tribunal upon the record as it was before the inferior court.'" *Harrison,* 169 W. Va. at 174, 286 S.E.2d at 283 (quoting *Snodgrass*, 114 W. Va. at 306, 171 S.E. 742-43). This Court "has jurisdiction and power, . . . to hear and determine the matter in controversy, upon the record made in the county court, and enter such judgment as the county court should have entered." Syl. Pt. 5, in part, *Humphreys v. County Court,* 90 W. Va. 315, 110 S.E. 701 (1922).

III. FINDINGS OF FACT

Bayer is currently engaged in litigation with the State of West Virginia over the taxability under West Virginia Constitution Art. X, § 1c (the "Freeport Amendment") of certain chemicals Bayer uses (the "chemicals case"). As a result of preparing discovery responses in the chemicals case, on or after March 21, 2003, one of Bayer's counsel, Mr. Broadwater, (Mr. Broadwater also represents Bayer this proceeding), discovered what he believed to be errors in Bayer's tax returns. Bayer, believing these errors fell within West Virginia Code § 11-3-27, sent a letter to the Kanawha County Commission dated August 21, 2003 and providing in pertinent part:

> Pursuant to West Virginia Code § 11-3-27, Bayer Corporation hereby applies for relief from erroneous personal property tax assessments for tax years 2001, 2002, and 2003 for its chemical plants at South Charleston and Institute. The errors in these assessments were the result of clerical errors or mistakes occasioned by an unintentional or inadvertent act as follows:

1. The amounts of inventory that Bayer reported on its personal property tax returns for the three tax years in question were taken from inventory reports generated in the normal course of business at the end of every calendar month. In order to report the value of the inventory on hand as of July 1 for tax years 2002 and 2003, Bayer inadvertently used the reports for the month ending July 31 as opposed to the report for the month ending June 30. Incorrect data was also reported in tax year 2001; however, the source of the error has not been determined.

2. Several materials were inadvertently reported as being finished goods when they should have been reported as raw materials for all three tax years. These materials were, in fact, produced at Bayer locations outside of West Virginia. Since they are materials produced by Bayer, they are treated as finished goods in Bayer's accounting systems from which the inventory reports are generated. However, all of these materials as used as raw materials at Bayer's Kanawha County facilities. Consequently, an exemption under the Freeport Amendment for these two materials was inadvertently claimed and granted.

3. For all three tax years, Bayer's accounting system included the value of some materials in inventory for the Kanawha County facilities when, in fact, the materials were in transit to or from Kanawha County. For example, propylene oxide was included on the inventory report as soon as it was loaded into river barges in Texas where it is produced for tax years 2001 and 2002. Therefore, Bayer inadvertently reported the value of these materials that were not actually located in Kanawha County for those two tax years.

4. In tax year 2003, Bayer claimed Freeport exemptions for raw materials in the amount of $11,377,398 for the South Charleston plant and $73,982 for the Institute plant. The claim for exemption at the South Charleston plant was denied and the entire $11,377,398 for raw materials was included by the state in the assessment for this facility, However, the $73,982 for raw materials was not included in the assessment for the Institute plant. While Bayer is asserting in a separation action its claim that all inventory is exempt from taxation under the Freeport Amendment, for the tax years in question, the state has consistently interpreted the law as exempting only finished goods. Therefore, we recognize that, in this instance, not including the $73,982 for raw materials was a clerical error on the part of the state.

All told, Bayer requested $456,747.00 for the three tax years in question.

The Commission held a hearing on Bayer's petition which produced the evidence and testimony upon which this Court relies.

Bayer is a multi-national corporation headquartered in this country in Pittsburgh, Pennsylvania, with its ultimate corporate headquarters in Germany. For the timeframes in question, Bayer had a federal tax group and state tax group. Mr. Gary Dzura, a CPA, was in charge of the state tax group which consisted of seven people.

While preparing for discovery in the chemicals case, Mr. Broadwater observed that he had assessments from the State for tax returns which did not correspond to the reports Bayer prepared dealing with the identical transaction. Exploring the cause for these discrepancies, Mr. Broadwater testified that Bayer was able to match the 2002 and 2003 tax returns to the inventory reports for the end of June and the end of July. Bayer was reporting inventory as of July 31 and not June 30.[4] Bayer was never able to ascertain the cause of the 2001 problem.

Bayer owned no industrial property in Kanawha County until April 1, 2000, when Bayer acquired from Lyondell Corporation the South Charleston chemical plant and a part of the Institute chemical facility. Due to the rapid nature of the acquisition, and the disparate accounting system of the two corporations, Bayer confronted several tax related complications including its unfamiliarity with the Kanawha County tax operations. As admitted by Mr. Dzura, the errors due to the disparate accounting system were Bayer's fault. Also, throughout 2000, Bayer's tax department was involved in a major restructuring of Bayer's domestic operations. As to the issue of intransit materials, Mr. Dzura testified that there was a difference between the accounting records from which the tax returns were prepared versus the accounting records at the plant sites. In essence, Bayer used corporate level reports which, because of systemic problems, failed to actually reflect the intransit inventories of

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[4]This testimony was confirmed by Glen W. Craney, Jr., site manager for Bayer Polymers, Polyether, Polyols Manufacturing Facilities in South Charleston and Institute.

where the barges were loaded. The general lack of knowledge exhibited by Bayer was not a lack of knowledge of West Virginia's taxes laws, but was a "general lack of knowledge about what [Bayer] was acquiring and what [it] owned[.]"

Glen W. Craney, Jr., is site manager for Bayer Polymers, Polyether, Polyols Manufacturing Facilities in South Charleston and Institute. Prior to working for Bayer, Lyondell employed Mr. Craney at the same facilities and in the same capacity as for Bayer. According to Mr. Craney, Bayer and Lyondell lacked financial accounting and reporting systems that were compatible. Minor mistakes between the two systems may have occurred over a course of time. When Bayer acquired Lynodell's facilities, Bayer brought in a new accounting supervisor, but the accounting department suffered no downsizing.

IV. DISCUSSION AND CONCLUSIONS OF LAW

Bayer Corporation petitioned the Kanawha County Commission for relief pursuant to W.Va. Code § 11-3-27, which provides, in relevant part:

> § 11-3-27. Relief in county commission from erroneous assessments
>
> > (a) Any taxpayer, or the prosecuting attorney or tax commissioner, upon behalf of the state, county and districts, claiming to be aggrieved by any entry in the property books of the county, including entries with respect to classification and taxability of property, **resulting from a clerical error or a mistake occasioned by an unintentional or inadvertent act as distinguished from a mistake growing out of negligence or exercise of poor judgment**, may, **within one year from the time the property books are delivered to the sheriff or withing one year from the time such clerical error or mistake is discovered or reasonably could have been discovered**, apply for relief to the county commission of the county in which such books are made out. . .(emphasis added)

By a 2-1 vote (Carper, President, dissenting), the County Commission of Kanawha County, West Virginia, entered an Order on February 19, 2004, holding:

> (a) That the standard of proof is by the preponderance of the evidence and that the petitioner met that standard;
>
> (b) That the errors resulted from a clerical error or mistake occasioned by an unintentional or inadvertent act as distinguished from a mistake growing out of negligence or the exercise of poor judgment; and
>
> (c) That Bayer Corporation applied for relief within one year from the time such clerical errors or mistakes were discovered or reasonably could have been discovered.

For the reasons set forth below, this Court hereby determines that the Order entered on the 19th day of February, 2004, should be reversed, except for the determination by the County Commission that the applicable standard of proof is by a preponderance of the evidence.

A. The standard of proof upon the applicant under West Virginia Code § 11-3-27 is by a preponderance of the evidence.

An issue raised in the briefs submitted by the parties is whether the burden of proof in valuation cases (that is, cases in which the taxpayer contests the value of his property as set by the Assessor before the County Commission sitting as the Board of Equalization and Review) is "by clear and convincing evidence" or "by a preponderance of the evidence". However, it is simply not necessary for this Court to resolve the question of the applicable standard of proof in valuation cases, for as the Respondent correctly observes, this is not a case in which the valuation of the Respondent's assets is at issue.

Rather, the County Commission is called upon to make two determinations when a taxpayer applies for exoneration under W. Va. Code § 11-3-27:

(1) whether the original assessment resulted "from a clerical error or a mistake occasioned by an unintentional or inadvertent act as distinguished from a mistake growing out of negligence or the exercise of poor judgment", and

(2) whether the aggrieved party applied for relief "within one year from the time the property books are delivered to the sheriff or within one year from the time such clerical error or mistake is discovered or reasonably could have been discovered".

W. Va. Code § 11-3-27 does not specify the burden of proof which the applicant must meet, and the Supreme Court of Appeals of West Virginia has not addressed this question.

The Court finds persuasive Respondent's assertion that, absent some reason why a higher standard of proof should apply, the burden of proof that an applicant for exoneration must meet is the same as that is any civil case, which is by a preponderance of the evidence. *Johnson by Johnson v. General Motors Corp.*, 190 W.Va. 236, 438 S.E.2d 28 (1993).

Because the valuation of the Respondent's assets were not at issue in this case, the specialized knowledge and training that the assessor and the State Tax Department bring to bear on valuation issues is no help to the County Commission in an exoneration. Overcoming this specialized knowledge and training in a valuation case may be a justification for setting a higher than normal burden of proof in a valuation case, but that reason is not present in an exoneration proceeding.

Petitioners also assert a policy reason for setting a higher than normal burden of proof in an exoneration case which, in essence, can be boiled down to the fact that taxes are a legitimate burden imposes in exchange for the benefits of living in a civilized society, and the money at issue has already been expended for those beneficial purposes. The Court finds this argument unpersuasive; while taxes in general are necessary, the Legislature provided a specific mechanism by which errors could be corrected regardless of whether the tax revenue has been

expended. In providing this mechanism, the legislature could have specified a higher then normal burden of proof, but it did not do so. Nor did the Petitioners cite any authority for their proposition that "[a]ny reduction in taxes available as a result of relief under West Virginia Code § 11 -3-27 (especially as here where the taxpayer's relief is based upon its own errors—whether culpable or not) and the corresponding threat to the financial and fiscal integrity of the public, indisputably calls for a high standard of proof to be imposed".

Accordingly, the Court finds that the County Commission was correct in its determination that the proper burden of proof in its proceeding was a preponderance of the evidence.

B. Bayer has not met the preponderance of the evidence standard, as the accounting discrepancies were the result of negligence, rather than a clerical error or mistake.

1. Use of wrong monthly inventory reports.

The Court first finds that Bayer is not entitled to relief for tax year 2001 on the basis of incorrect inventory data. Since Bayer is unable to demonstrate how the 2001 error occurred, Bayer cannot be said to have shown it was a clerical error or a mistake occasioned by an unintentional or inadvertent act as distinguished from a mistake growing out of negligence or the exercise of poor judgment. As to tax years 2002 and 2003, the Court finds that using the inventory from the wrong month is not a clerical error or a mistake occasioned by an unintentional or inadvertent act as distinguished from a mistake growing out of negligence or poor judgment.

First, the error is not clerical. "'A clerical error is . . . "[a]n error committed in the performance of clerical work, no matter by whom committed; more specifically, a mistake in

copying or writing; a mistake which naturally excludes any idea that its insertion was made in the exercise of any judgment or discretion, or in pursuance of any determination; an error made by a clerk in transcribing, or otherwise, which must be apparent on the face of the record, and capable of being corrected by reference to the record only[.]"'" *Barber v. Barber,* 195 W. Va. 38, 43, 464 S.E.2d 358, 363 (1995) (citations omitted). The most recent edition of *Black's Law Dictionary* is in accord:

> ***clerical error.*** An error resulting from a minor mistake or inadvertence, esp. in writing or copying something on the record, and not from judicial reasoning or determination. Among the boundless examples of clerical errors are omitting an appendix from a document; typing an incorrect number; mistranscribing a word; and failing to log a call. A court can correct a clerical error at any time, even after judgment has been entered.

Black's Law Dictionary at 582 (8th ed. 2004).[5] The controlling concept which characterizes a clerical error is that the error arises from the mechanical process of writing or copying information or the mechanical act of preparing a single document such as omitting a referenced appendix transposing numbers on a tax form.

These definitions are consistent with the approach of other courts addressing the issue in the context of tax statutes. For example, in *Ammons v. County of Wake,* 490 S.E.2d 569, 571 (N.C. Ct. App. 1997) (quoting *Black's Law Dictionary* 252 (6th ed.1990)) the North Carolina Court of Appeals said, "[c]lerical error has been defined as '[g]enerally, a mistake in writing or copying . . . . It may include error apparent on face of instrument, record, indictment or information." Clerical error contemplates transcription errors and the like within a document

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[5]*See Buckhannon Bd. and Care Home, Inc. v. West Virginia Dept. of Health and Human Resources,* 532 U.S. 598, 616 (2001) (Scalia, J., concurring) (observing that court's may employ *Black's Law Dictionary* to interpret a legal term of art).

itself. Bayer's using the wrong inventories does not come within the purview of a clerical error.

Further, "to qualify as a clerical error, the mistake must ordinarily be apparent on the face of the instrument." *Ammons*, 490 S.E.2d at 571. A clerical error "'must be . . . capable of being corrected by reference to the record only.'" *Id.* (quoting *Trott v. Birmingham Ry., Light & Power Co.*, 39 So. 716, 717 (Ala. 1905)). Here, there is no dispute that the inventory errors were not apparent on the face of either the tax returns or the corporate documents Bayer employed in preparing its returns. Rather, it was not until Mr. Broadwater began comparing data, in what Bayer characterizes as an out of the ordinary circumstance, that the discrepancies became manifest.

Additionally, "a clerical error must be unintended." *Id.* "Where an error is of a deliberate nature such that the party making it at the time actually intended the result that occurred, it cannot be said to be clerical." *National CSS, Inc. v. City of Stamford*, 489 A.2d 1034, 1040 (Conn. 1985). Here, Bayer clearly intended to use the erroneous inventory sheets in preparing its returns. Bayer's inventory errors cannot be considered clerical. Neither can they be considered mistakes occasioned by an unintentional or inadvertent act as distinguished from a mistake growing out of negligence.

During the hearing before the Commission, the following exchange occurred between the President of the Commission and Ned Rose, one of Bayer's counsel:

> COMMISSIONER CARPER: You mean, they went out and they bought companies all over the place and they were real busy and they didn't have time to know what they were doing?
>
> MR. ROSE: That's not the--that's true.

Further, Mr. Craney testified:

COMMISSIONER CARPER: Is it a fair statement to make that the transition from the predecessor company to Bayer was considerable confusion?

THE WITNESS: That is a very fair statement.

Similarly, Mr. Dzura testified before the Commission:

COMMISSIONER HARDY: And let me see if I understand. Your group in Pittsburgh, which is trying to get this material together, didn't grasp exactly how they kept their records or what they were doing down in South Charleston or down in West Virginia. I guess the plants in South Charleston officially?

THE WITNESS: Yes, sir.

COMMISSIONER HARDY: So they fill out the return and then [Mr. Broadwater] goes to South Charleston two years later, get the South Charleston material, and finds that it doesn't match the information put on in Pittsburgh. That's the way I understand your testimony.

THE WITNESS: And it's substantially accurate, right.

While Mr. Craney testified that during the transition period he believed Bayer "tried to use extraordinary care" and that Bayer was "better than the average chemical company," corporations do not insulate themselves from liability when there is a lack of internal communication and confusion. "It is no excuse that the left hand did not know what the right hand was doing." *R.A. Siegel Co. v. Brown*, 539 S.E.2d 873, 878 (Ga. Ct. App. 2000). "A taxpayer cannot avoid its duty to file accurate returns by shifting responsibility to its bookkeeper or its employee when the taxpayer makes an inadequate effort to see that the books and records are being kept correctly." *Tietig v. Commissioner of Internal Revenue*, TC-Memo 2001-190, 82 T.C.M. (CCH) 304, 2001 WL 837944 (U.S. Tax Ct.), *aff'd*, 57 Fed. App. 414 (11th Cir. 2001). Consequently, the Court concludes that the errors in inventory reports was the result of negligence and does not afford Bayer a basis for relief under West Virginia Code § 11-3-27.

2. Erroneously including the value of some materials in inventory for the Kanawha County facilities when, in fact, the materials were in transit to or from Kanawha County.

For many of the same reasons as discussed above, the Court finds that Bayer in including in tax years 2001 and 2002 the value of some materials in inventory for the Kanawha County facilities when, in fact, the materials were in transit to or from Kanawha County falls within West Virginia Code § 11-3-27.

First, for this error to be clerical, the error must have been apparent on the face of the document. Such errors as Bayer alleges was not evident on the face of the documents since Mr. Broadwater had to use external documents to identify the discrepancies.

Second, the error must be unintended. Here, Bayer intended to report as it did and to pay the taxes. Reporting and paying the taxes was not a clerical error, but an error of substance. *National CSS, Inc. v. City of Stamford,* 489 A.2d 1034, 1040 (Conn. 1985) ("The plaintiff, at the time it listed the leased computer equipment on its tax return and paid the disputed taxes, operated under the mistaken belief that it actually owed taxes on the equipment to the defendant. Because the plaintiff's action in listing the property and paying the taxes, although mistaken, was deliberate and intentional, it is not clerical, but can only be characterized as an error of substance.").

Bayer's argument that its suffered from "systemic problems" whereby there was a difference between accounting records from which the returns were prepared versus the accounting records at the plant sites must fail for the same reasons as its inventory report argument fails, because such constitutes negligence. *See Alabama Power Co. v. Emigh,* 429 So.2d 952, 955 (Ala. 1983) (characterizing the facts as disclosing "a form of bureaucratic

bungling in which the left corporate hand did not know what the right corporate hand was doing" which showed "a display of ineptitude or negligence . . . ."). Therefore, this Court concludes that Bayer is not entitled to relief.

Because this Court has determined that the accounting discrepancies were the result of negligence rather than a clerical error or mistake, and therefore the Respondent is not entitled to relief, the Court does not address whether or not the relief sought by Bayer was applied for within one year from the time the accounting discrepancies were discovered or reasonably could have been discovered.

V. CONCLUSION

1. The writ of certiorari is hereby **GRANTED**.

2. The Order of the County Commission of Kanawha County, West Virginia dated February 19, 2004 is hereby **REVERSED**.

3. The corrections of the assessments of *ad valorem* personal property of the taxpayer and Respondent Bayer Corporation in the amount of $14,513,992 for the years 2001, 2002, and 2003 are hereby **STRICKEN**, and the assessments for such years are hereby **RESTORED** to the amounts as previously fixed by the Assessor of Kanawha County, West Virginia.

The circuit clerk is ordered to mail a certified copy of this order to all counsel of record.

Entered this 10th day of August, 2006.

Jennifer Bailey Walker

JENNIFER BAILEY WALKER, Judge
Thirteenth Judicial Circuit

Date: 8-14-06
Certified copies sent to:
counsel of record
parties
(please indicate)
By:
certified/1st class mail
fax
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interdepartmental
Other, if duties accomplished.
Deputy Circuit Clerk

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE COPY FROM THE RECORDS OF SAID COURT GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 15 DAY OF August 2006
Cathy S. Gatson
CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA EX
REL. MICHAEL CLIFFORD,

Petitioner,

v.

Civil Action No. 04-AA-26
Honorable Jennifer Bailey Walker

BAYER CORPORATION,

Respondent.

ORDER DENYING BAYER'S RULE 59(A) AND 59(E) MOTIONS

I. INTRODUCTION

Bayer has filed a Rule 59(a) Motion for a New Trial and a Rule 59(e) Motion to Alter or Amend Judgment.[1] The Court finds Bayer is not entitled to relief under either motion.

II. FACTUAL BACKGROUND

The facts of this case are set out in the Court's August 10, 2006 Final Order. Suffice it here to say that Bayer filed a Rule 59(a) Motion for a New Trial on August 24, 2006 and a Rule 59(e) Motion to Alter or Amend Judgment on January 17, 2007.

III. DISCUSSION

A. The rule 59(e) motion.

The Court will deal with the Rule 59(e) motion first since it does not require the Court to address its substance. Rule of Civil Procedure 59(e) provides, "Motion to Alter or Amend a Judgment. Any motion to alter or amend the judgment shall be filed not later than 10 days after entry of the judgment." The Court entered a final judgment on August 10, 2006. Bayer filed its Motion to Alter or Amend Judgment on January 17, 2007. Rules of

[1]At oral argument, Bayer's counsel referred to a Rule 60 motion, but the only motions Bayer filed expressly cite to Rule 59(a) and Rule 59(e), respectively.

Court are governed by the rules of statutory construction. *Vance v. West Virginia Bureau of Employ. Prog.*, 217 W. Va. 620, 623, 619 S.E.2d 133, 136 (2005). "It is well established that the word 'shall,' in the absence of language in the statute showing a contrary . . . should be afforded a mandatory connotation." Syl. Pt. 1, *Nelson v. W. Va. Public Employ. Ins. Bd.*, 171 W. Va. 445, 300 S.E.2d 86 (1982). The West Virginia Supreme Court has already held that the ten day time limit in Rule 59(b) dealing with new trials is "mandatory and jurisdictional" and that "[t]he time required for service of such a motion cannot be extended by the court or by the parties." *See* Syl. Pt. 1, in part, *Boggs v. Settle*, 150 W. Va. 330, 330, 145 S.E.2d 446, 447 (1965).[2] Because West Virginia Rule of Civil Procedure 6(b) includes both Rule 59(b) and Rule 59(e) in prohibiting a circuit court from extending the time allocated under those Rules, the Court lacks any authority to consider the Rule 59(e) motion. Because there is no way that the motion could be made timely, the Court must dismiss it with prejudice.

B. The Rule 59(a) Motion.

The Court now turns to the Rule 59(a) motion. Rule 59(a) states in pertinent part,

> **Grounds.** A new trial may be granted to all or any of the parties and on all or part of the issues . . . in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

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[2]Prior to 1998, Rule 59(e) required only service within 10 days. The Rule now explicitly provides for filing within 10 days. Franklin D. Cleckley, et al., *Litigation Handbook on West Virginia Rules of Civil Procedure*1314 n.528 (2d ed. 2006).

While Rule 59(a) does not set forth the grounds it encompasses, the rule must be read in conjunction with Rule of Civil Procedure 61 which requires granting a new trial only when failure to do so would be "inconsistent with substantial justice." *McDonough Power Equip., Inc. v. Greenwood,* 464 U.S. 548, 553 (1984). Hence, "[t]he power to grant a new trial should be used with care, and a circuit judge 'should rarely grant a new trial.'" *Gerver v. Benavides*, 207 W. Va. 228, 231, 530 S.E.2d 701, 704 (1999) (per curiam) (quoting *In re State Public Bldg. Asbestos Litig.*, 193 W. Va. 119, 124, 454 S.E.2d 413, 418 (1994)). Bayer has pointed to nothing meeting this substantial burden.

1. *Newly discovered evidence.*

Bayer first claims it is entitled to relief to present newly discovered evidence. "A motion for a new trial based on after-discovered evidence is seldom granted and the circumstances must be unusual or special to warrant a grant." *Fluharty v. Wimbush*, 172 W. Va. 134, 138, 304 S.E.2d 39, 43 (1983) (per curiam).

> "'A new trial will not be granted on the ground of newly-discovered evidence unless the case comes within the following rules: (1) The evidence must appear to have been discovered since the trial, and, from the affidavit of the new witness, what such evidence will be, or its absence satisfactorily explained. (2) It must appear from facts stated in his affidavit that plaintiff was diligent in ascertaining and securing his evidence, and that the new evidence is such that due diligence would not have secured it before the verdict. (3) Such evidence must be new and material, and not merely cumulative; and cumulative evidence is additional evidence of the same kind to the same point. (4) The evidence must be such as ought to produce an opposite result at a second trial on the merits. (5) And the new trial will generally be refused when the sole object of the new evidence is to discredit or impeach a witness on the opposite side.' Syllabus point 1, *Halstead v. Horton*, 38 W. Va. 727, 18 S.E. 953 (1894)." Syllabus, *State v. Frazier*, 162 W. Va. 935, 253 S.E.2d 534 (1979).

Syl. Pt. 6, *Adams v. El-Bash*, 175 W. Va. 781, 338 S.E.2d 381 (1985).

Bayer filed its Motion for a New Trial on August 24, 2006 and included an affidavit from Fred W. Geldmaker, III. Bayer subsequently filed an affidavit of Heidi Leep approximately a week later. The Court cannot consider either affidavit.

West Virginia Rule of Civil Procedure 59(c) provides, "When a motion for new trial is based upon affidavits they *shall* be filed with the motion." It is mandatory that the affidavits be filed with the motion. The Leep affidavit was not filed with the motion. The Court cannot consider the tardy Leep affidavit.[3]

The Court also cannot consider the Geldmaker affidavit. Mr. Geldmaker's affidavit states that Barbara Zierold, apparently a Bayer employee, related the results of the Heidi Leep inquiry to him. Mr. Geldmaker's affidavit contains nothing indicating his personal knowledge as to how the discrepancies arose. Rather, his affidavit states he was told by Barbara Zierold, about the results of Ms. Leep's inquiry. Under Rule 59(a), the Court cannot consider this hearsay affidavit. 35B C.J.S. *Federal Civil Procedure* § 1098 (footnotes omitted) ("The movant's burden is a substantial one, which a mere hearsay affidavit will not satisfy."). Additionally, the Court cannot consider this affidavit since it

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[3]Bayer never did file a motion with the court seeking an extension of time. It appears, though, that Ms. Leep was on vacation when the Rule 59(a) motion was due. Even if the Court were otherwise permitted to excuse the tardy affidavit, the Court doubts that simply being on vacation would constitute a sufficient basis to extend the time for filing the affidavit. *Cf. Baustert v. Superior Court*, 29 Cal. Rptr.3d 208, 213 (Ct. App. 2005) ("the fact that a witness will be on vacation on the date set for trial does not by itself constitute good cause for a continuance."); *Glassworks, Inc. v. State Human Rights Comm'n*, 518 N.E.2d 343, 346 (Ill. Ct. App. 1987) (citation omitted) ("'Accordingly, we believe the fact that Mr. and Mrs. Harris were on vacation at the time of the fact finding hearing was not--under the circumstances of this case--'good cause' for their failure to appear.'"); *Matter of Snap*, 479 N.Y.S.2d 332, 334 (N.Y. Fam. Ct. 1984) (good cause for continuance not shown simply by fact of arresting officers absence due to his being on vacation). *Cf. Koselke v. Chicago Heights Glass, Inc.*, 1997 WL 583087, *2 (N.D. Ill.) (motion for extension of time to respond to Complaint supported solely on the basis that counsel was in Europe on vacation, without more, does not constitute good cause for extension).

would allow Bayer to avoid the consequences of its late filing of the Leep affidavit and "what cannot be done directly cannot be done indirectly." *Cummings v. Missouri*, 71 U.S. 277, 325 (1866).

Alternatively, if the Court considered the affidavits, the Court would find that they still do not meet Bayer's burden. The Leep affidavit says that Bayer's "computer program worked correctly for four years, but failed when the computer program was taken over by the Bayer Tax Department." In her affidavit, Ms. Leep also states, "[t]he error in question for this inquiry occurred because the CDG references were not properly updated based upon the specific date in which the programs were run."

Evidence or defenses known to a party before the decree in a case are not grounds for setting aside a judgment. *See* Syl. Pt. 4, *Richmond v. Richmond*, 62 W. Va. 206, 57 S.E. 736 (1907). "[I]n order to support a motion for reconsideration, 'the movant is *obliged* to show not only that this evidence was newly discovered or unknown to it until after the hearing, but also that it could not with reasonable diligence have discovered and produced such evidence at the hearing.'" *Boryan v. United States*, 884 F.2d 767, 771 (4th Cir. 1989) (quoting *Frederick S. Wyle P.C. v. Texaco, Inc.*, 764 F.2d 604, 609 (9th Cir. 1985) (citations and quotation marks omitted)) (emphasis in original). "Evidence that is available to a party prior to entry of judgment, therefore, is not a basis for granting a motion for reconsideration as a matter of law." *Id.* at 771-72. The alleged newly discovered evidence claimed by Bayer in its affidavits is, as a matter of law, not newly discovered. It was well known to Bayer being that the information was in Bayer's own computer files and program. Additionally, the Leep affidavit says that Bayer's "computer program worked correctly for four years, but failed when the computer program was taken over by the Bayer Tax

Department[,]" and that "[t]he error in question for this inquiry occurred because the CDG references *were not properly updated* based upon the specific date in which the programs were run." It appears that it is below Bayer's own standard of reasonable care to not properly update a computer program. Therefore the affidavits also are not evidence "as ought to produce an opposite result at a second trial on the merits." Syl. Pt. 6, in part, *Adams v. El-Bash*.

Bayer additionally asserts that the Court did not understand that the external document Bayer used to discover the errors was a Property Tax Ruling which "[was] not available to Bayer until its attorneys acquired them during the discovery in the underlying taxability appeal." Bayer did not produce this ruling before the Commission and does not do so here. In any event, Bayer concedes the tax ruling was a Bayer Tax Ruling. Bayer cannot seriously claim ignorance of the ruling.

Bayer then claims new evidence because it located files relating to the Kanawha County facilities in its Marshall County files, all located in Bayer's Pittsburgh Tax Department. Bayer asserts that "[t]he significance of this new material was not recognized until August 2006 during the process of responding to discovery requests in the Marshall County Appeals." "[M]isplaced evidence is not newly discovered evidence," *Lans v. Gateway*, 110 F. Supp.2d 1, 5 (D.D.C. 2000); *nCUBE Corp. v. SeaChange Intern., Inc.*, 313 F. Supp.2d 361, 379 n.1 (D. Del. 2004); *Sammaritano v. Attractive Fashions, Inc.*, 464 N.Y.S.2d 875, 876 (App. Div. 1983), and neither is evidence whose importance is missed by a party. *Farmland Industries, Inc. v. National Union Fire Ins. Co.*, 2004 WL 2958458, *1 (D. Kan.) ("That plaintiff did not realize the importance of these documents until after the Court issued its summary judgment ruling does not transform otherwise previously

available evidence into newly discovered evidence."); *State v. Curless*,44 P.3d 1193, 1196 (Idaho Ct. App. 2002). Bayer has failed to meet the requirements for the Court to grant a new trial based on the "evidence" it offers. Bayer's motion in this regard is denied.

2. *Wrong Standard.*

Finally Bayer asserts that the Court applied the wrong standard in not deferring to the County Commission factually and legally. Bayer claims the Court should have applied the standard of review contained in the West Virginia Administrative Procedures Act rather than that contained in the West Virginia Certiorari statute, W. Va. Code § 53-3-3.

Bayer initially claims the Court "simply reversed the decision of the Commission, substituting its conclusions based upon a reading of a cold record for those of the members of the commission [sic] who had the opportunity to hear the witnesses and weigh their testimony . . . ." Bayer errs in law as well as fact.

Bayer's first problem is that the Commission made no findings of fact at all supporting its conclusion that the errors Bayer claimed "were the result of clerical error or mistake occasioned by an unintentional or inadvertent act as distinguished from a mistake growing out of negligence or the exercise of poor judgment." "The Administrative Procedures Act . . . requires a concise and explicit explanation of the facts underlying an agency's findings that the substantive statute has or has not been complied with. A simple recitation of findings of fact in bare statutory language will not suffice." *St. Mary's Hosp. v. State Health Planning and Development Agency,* 178 W. Va. 792, 796-97, 364 S.E.2d 805, 809 -10 (1987). Thus, under the APA, an agency has the affirmative duty to set forth its findings of fact justifying its conclusion and the Court has no duty to scour the record to find evidence supporting the Commission's ruling. *See, e.g., United Steelworkers of*

America v. Bethlehem Steel Corp., 472 A.2d 62, 69 (Md.1984) (citing, inter alia, *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156 (1962); *S.E.C. v. Chenery Corp.*, 318 U.S. 80 (1943); *Harborlite Corp. v. I.C.C.*, 613 F.2d 1088 (D.C. Cir.1979); *Bell Lines, Inc. v. United States*, 263 F.Supp. 40, 44-46 (S. D. W. Va.1967); 3 Kenneth Culp Davis, *Administrative Law Treatise* § 14:29 (2d ed. 1980)) ("Judicial review of administrative action differs from appellate review of a trial court judgment. In the latter context the appellate court will search the record for evidence to support the judgment and will sustain the judgment for a reason plainly appearing on the record whether or not the reason was expressly relied upon by the trial court. However, in judicial review of agency action the court may not uphold the agency order unless it is sustainable on the agency's findings and for the reasons stated by the agency."). Ironically, had the Court applied the APA, the Court would have had no option but to reverse this case.

Bayer's second problem is that no where does Bayer cite any point in the Court's original order where the Court questioned the veracity of *any* of its witnesses when the Court independently reviewed the record under the Certiorari statute. Indeed, the Court's order specifically quoted the testimony of Bayer's witnesses and statements of Bayer's counsel–all of which the Court took to be absolutely true. Bayer apparently does not simply want another bite at the apple, but the whole orchard. *State ex rel. Richey v. Hill*, 216 W. Va. 155, 172, 603 S.E.2d 177, 194 (2004) (Maynard, C.J., concurring).

Bayer then relies on footnote three of the per curiam opinion in *Adkins v. West Virginia Dep't of Ed.*, 210 W. Va. 105, 108, 556 S.E.2d 72, 75 (2001), where the Court stated "[w]e note though that the standard of review under both statutes [the APA and Certiorari] is essentially the same. *See* W. Va. Code § 29A-5-4(g) (1998)." A review of the two statutes

does not appear to support this. Upon review the Court can also reconcile what appears to be contradictory authority.

While *Adkins* dealt with a state agency this case deals with a county commission. The APA applies only to state, but not local, agencies. *See, e.g.*, Syl. Pt. 1, in part, *Southwestern Community Action Council, Inc. v. City of Huntington Human Relations Comm'n*, 179 W. Va. 573, 371 S.E.2d 70 (1988). Applying the APA to a county decision is impermissible. On the other hand, the APA itself authorizes use of the Certiorari statute to review administrative decisions. Syl. Pt. 2, *Scott v. Stewart*, 211 W. Va. 1, 560 S.E.2d 260 (2001). Thus, it does not offend the APA to apply its standard of review in a Certiorari case where a state agency is a party. Consequently, if a state agency is a party in a Certiorari case, then the APA standards would apply, but if the party is a local entity West Virginia Code § 53-3-3's broader standard would apply. This approach discharges the Court's duty to harmonize West Virginia Code § 53-3-3, West Virginia Code § 29A-1-2(a), *Southwestern Community Action Council, Inc. v. City of Huntington Human Relations Comm'n*, and *Adkins v. West Virginia Department of Education*. Of course, in any event, the practical effect of any difference in the statutes in this case is nil.

A reviewing court affords deference to an agency when the agency has exercised its special expertise. Where the question before the agency requires no special expertise to answer it, deference is inappropriate. *Christie v. Elkins Area Med. Ctr., Inc.*, 179 W. Va. 247, 250, 366 S.E.2d 755, 758 (1988) ("the statute and regulations are straightforward, and do not hinge on the exercise of agency discretion or expertise for uniform application. Thus, there is no reason to defer to the agency on the basis of primary jurisdiction."); *Little and Tall, Inc. v. Alcohol Bev. Control Bd.*, 59 Va. Cir. 212 (2002) ("where the issue falls outside

the specialized competence of the agency, such as . . . statutory interpretation issues, little deference is required to be accorded the agency decision."). Here, the question was whether Bayer was negligent. It does not require any particular agency expertise to determine if Bayer was negligent. "It takes no special expertise to resolve the negligence question." *South Eastern Indiana Natural Gas Co., Inc. v. Ingram*, 617 N.E.2d 943, 950 (Ind. Ct. App. 1993); *Department of Regulation & Licensing v. State Medical Examining Bd.*, 572 N.W.2d 508, 512 (Wis. Ct. App.1997) (court owed no deference to state medical board's interpretation of "negligence in treatment"); *Muise v. GPU, Inc.*, 753 A.2d 116, 126 (N.J. Super. Ct. App. Div. 2000). In this case, "[r]esolution of [the] claim requires exercise of judicial skills and remedies rather than administrative expertise." *Moore v. Pacific Northwest Bell*, 662 P.2d 398, 402 (Wash. Ct. App.1983). Thus, Bayer has provided no basis for the Court to revisit the Court's final order. In fact, Bayer has not cited a single case that supports the decision of the Commission while the Plaintiffs have cited numerous cases supporting their arguments. The uncontroverted facts establish Bayer fell below a reasonable standard of care–as Bayer's counsel explained, Bayer "went out and they [sic] bought companies all over the place and they were [sic] real busy and they [sic] didn't have time to know what they [sic] were doing." A reasonable company would strive to ensure corporate cohesion and communication, if, for no other reason, than self-preservation. "Any other rule would permit fragmentation by a corporate principal that would make business with it impossibly impracticable." *Continental Cas. Co. v. United States*, 337 F.2d 602, 603 (1st Cir. 1964) (citations omitted) Thus, as the Assessor rightly points out, "'[a]n example of negligence . . . may be found in a large organization where the 'right hand' does not know what the 'left hand' is doing.'" (quoting 30 *Williston on Contracts* § 77:1 (4th

ed.)).[4] A reasonably prudent company would not simply rely on a computer without adequate safeguards to ensure accuracy.[5] The Commission's decision is infected by legal error and is clearly wrong in light of the entire record. W. Va. Code § 29A-5-4(g)(4),(5). Any error in the Court's prior ruling did not affect Bayer's substantial rights and is not a basis for relief.

IV. CONCLUSION

The Court **DENIES** Bayer's Rule 59(a) Motion for a New Trial, **DISMISSES** Bayer's Rule 59(e) Motion to Alter or Amend Judgment, with prejudice, and **ORDERS** this case struck from the docket of the Court.

The Clerk is directed to send a certified copy of this order to all counsel of record.

Entered this 30th day of April, 2007.

The Honorable Jennifer Bailey Walker
Judge, Circuit Court of Kanawha County

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[4]The Court cannot help but think that Bayer would be singing another tune if one of its customers avoided its contractual obligations to Bayer since the customer did not properly update its computer on the justification that it was "real busy and [it] didn't have time to know what [it was] doing."

[5]For other cases finding negligence for relying on computers in different contexts, see Joseph P. Zammit, *Tort Liability for Mishandling Data* 322 PLI/Pat 429 at 432-34 (1991).